

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

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JOE COMES and RILEY PAINT, INC., an : No. CV 05-562  
Iowa corporation, :

Plaintiffs, :

v. :

MICROSOFT CORPORATION, :  
a Washington corporation, :

Defendant. :

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**MICROSOFT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION  
TO EXTEND ITS TIME TO RESPOND TO PLAINTIFFS'  
MOTION TO AMEND THE PETITION**

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October 28, 2005

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The reasons advanced by Microsoft in support of its request for an extension stand unchallenged. Plaintiffs do not dispute that the Judicial Panel on Multidistrict Litigation (“JPML”) is virtually certain to transfer this action to the Hon. J. Frederick Motz of the United States District Court for the District of Maryland, as it has more than 100 similar cases. Moreover, plaintiffs do not dispute that Judge Motz, who has presided over dozens of closely related actions against Microsoft over the past five years is well-versed in the background relevant to their motion to amend the petition. And plaintiffs do not dispute that it makes sense to conduct briefing of plaintiffs’ motion to amend after the parties know which court will decide the motion and the relevant circuit law that will be applied.

Plaintiffs do not argue that they will suffer prejudice of any kind if Microsoft is granted the requested extension. Instead, plaintiffs base their resistance to this motion solely upon the conclusory statement that Microsoft's removal was "filed for the purpose of delay" and is "wholly without merit." (Pls.' Resistance to

Mot. to Extend Time to Respond to Pls.' Mot. to Amend the Pet. ¶ 5). Both assertions are false. In any event, important interests in judicial efficiency and economy will be served by extending Microsoft's time to respond.

In addition, although plaintiffs do not mention it in their resistance to this motion, on October 18, they filed a "notice" purporting to withdraw the federal claims they asserted in their proposed Fourth Amended Petition.<sup>1</sup> Thus, not only is the court that will decide this motion still to be determined, but plaintiffs' motion to amend is also a moving target.

In light of the lack of any prejudice to plaintiffs and in the interests of efficiency, Microsoft's motion for an extension should be granted.

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<sup>1</sup> This effort to deprive this Court of jurisdiction after removal is unavailing. Removal jurisdiction is determined based on the pleadings at the time of removal. *Pullman v. Jenkins*, 305 U.S. 534, 537 (1939); *Crosby v. Paul Hardeman, Inc.*, 414 F.2d 1, 3 (8th Cir. 1969).

### CONCLUSION

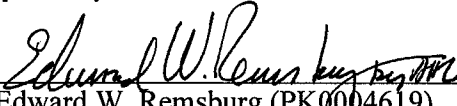
This Court should enter an order extending Microsoft's time to respond to plaintiffs' Motion to Amend the Petition until 20 days after the JPML has determined whether this case should be transferred to the United States District Court for the District of Maryland.

Dated: October 28, 2005

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PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING  
INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE  
ABOVE CAUSE TO EACH OF THE ATTORNEYS OF  
RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES  
DISCLOSED ON THE PLEADINGS ON

October 28, 2005

BY ☒ U.S. MAIL ☐ FAX  
☐ HAND DELIVERED ☐ PRIVATE CARRIER

SIGNATURE/s/ Ann Baier

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